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Supreme Court of the United States

OCTOBER TERM, 1973

Docket No. 73-430

WILLIAM K. DICKEY, ALFRED N. BEADLESTON and THOMAS H. KEAN,

Petitioners,

vs.

KENNETH ROBINSON and WILLIAM T. CAHILL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the New Jersey Supreme Court

BRIEF ON BEHALF OF *AMICI CURIAE* IN OPPOSITION

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IN THE

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Interest of *Amici Curiae*

Amici Curiae, Education Committee of the Newark Chapter, National Association for the Advancement of

Colored People and the American Civil Liberties Union of New Jersey, have fully participated in this proceeding. *Amici* filed briefs and argued legal points at the trial level. They also filed briefs and argued orally before the New Jersey Supreme Court both in the original appeal and the supplemental hearing on remedy. They have been intimately involved in every aspect, at every level of the instant case.

The Education Committee of the Newark Chapter of the N.A.A.C.P. is a body dedicated to obtaining equal opportunities for black children in the public school system. The Committee has consistently worked toward achieving an education system in this State which will adequately prepare every child to function effectively as a citizen with a full stake in our social, economic and political system. The Committee has been particularly concerned with the grave disparities that exist in the ability of New Jersey's inner cities, including Newark, as compared with wealthy suburbs, to raise sufficient funds for financing a "thorough and efficient" education for all public school children. The Committee is directly and immediately concerned with the resolution of the legal issues raised by the present financing system.

The American Civil Liberties Union of New Jersey is an organization dedicated to the realization and preservation of the Constitutional rights of all people of the State of New Jersey *and* with the education of the children of this State so that they may intelligently and effectively assume the roles of citizens with a full stake in our society.

Opinions Below

The opinion of the New Jersey Superior Court is reported at 118 N. J. Super. 223, 287 A. 2d 187; its supplemental opinion is reported at 119 N. J. Super. 40, 289 A. 2d 569. The opinion of the New Jersey Supreme Court is reported at 62 N. J. 473, 303 A. 2d 273; its supplemental opinion is reported at 63 N. J. 196, 306 A. 2d 65.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3), stating that "This Court has granted certiorari under this statute to review the validity under the federal constitution of provisions in a state constitution." (PW 2).* However, that jurisdictional basis is inapplicable here, where there is no question of the validity of the New Jersey Constitution's provision on education.** Thus, petitioners at the outset have improperly invoked the jurisdiction of this Court.

Petitioners also claim under their jurisdictional statement that the judgment sought to be reviewed was entered on June 19, 1973 and that a subsequent motion was made to extend the time to petition for rehearing which the N. J. Supreme Court denied on August 2, 1973. The relevance of these contentions is dealt with in the body of this brief.

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* References designated "PW" and followed by numerals refer to pages of the Petition for Writ of Certiorari.

** See PW App. C 122a-146a where Chief Justice Weintraub, for the New Jersey Supreme Court, discusses the state constitutional provision regarding education.

Questions Presented

1. Should this Court take jurisdiction over a question which was never raised below?
2. Should this Court take jurisdiction of a petition filed out of time?
3. Should this Court take jurisdiction in this case in view of its well-settled policy to deny review of decisions by a state court resting on independent and wholly adequate state grounds?
4. Should this Court take jurisdiction of petitioners' questions arising under the guarantee of a republican form of government mandated by Article IV, Sec. 4 of the United States Constitution, which questions are political and not judicial in character?
5. Should this Court, under the guise of enforcing the state doctrine of separation of powers, substitute its judgment for that of the highest court of New Jersey in construing the State Constitution?

Constitutional Provisions

U. S. Constitution, Article IV, Sec. 4:

> "Sec. 4. The United States shall guarantee to every state in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

New Jersey Constitution:

"ARTICLE III

DISTRIBUTION OF THE POWERS OF GOVERNMENT

1. Branches of Government

1. The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No one person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."

New Jersey Constitution:

"ARTICLE VIII

TAXATION AND FINANCE

Section IV

1. Maintenance and support of schools

1. The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of five and eighteen years."

Statement of the Case

This action was brought by students, parents, residents, taxpayers, and municipal officers of New Jersey challenging the constitutionality of the state's system of financing its public schools under Article VIII, Sec. 4, Para. 1 of the New Jersey Constitution, and under the equal protection clauses of the New Jersey Constitution and of the Fourteenth Amendment to the United States Constitution.

The trial court held that the statutory scheme violated both the education clause of the New Jersey Constitution, and the equal protection clauses of the New Jersey Constitution and of the Fourteenth Amendment to the United States Constitution (PW App. A 72a-73a). On appeal, the New Jersey Supreme Court held on April 3, 1973 that the state's method of financing education was violative of the state constitutional education provision, Article VIII, Sec. 4, Para. 1 (PW App. C 139a-146a), but expressly declined to find a violation of the equal protection clauses of the New Jersey or United States Constitutions (PW App. C 98a-122a). Further argument was held regarding remedies and a brief supplemental opinion was filed on June 19, 1973 (PW App. D).

Petitioners thereafter moved for an extension of time to petition for rehearing to the New Jersey Supreme Court. Their petition was denied on August 2, 1973.

Amici contend that the petition for certiorari also should be denied since it is insufficient, inadequate, and jurisdictionally defective in that:

1. The issue on which petitioners seek review was never raised below and, therefore, according to well-established rules of this Court, it is not subject to review.

2. The petition is untimely since it seeks review of the opinion and judgment of the New Jersey Supreme Court dated April 3, 1973.

3. No federal question is presented since the state court decision rests solely on independent and adequate state grounds.

4. Petitioners' argument that the decision of the New Jersey Supreme Court denied the State a republican form of government is jurisdictionally inadequate.

Questions arising under the federal guarantee of a republican form of government have long been considered political and not judicial in character and thus for the consideration of Congress or a legislature and not the courts.

5. The power of the state judiciary to rule a state statute relating to education unconstitutional under the State Constitution raises no federal issue under the state separation of powers doctrine.

ARGUMENT

I. The question sought to be reviewed was never raised below and, therefore, is foreclosed from review by this Court.

Petitioners concede that the issue on which they seek review by this Court was never raised prior to the New Jersey Supreme Court's April 3, 1973 opinion or its June 19, 1973 supplemental order (PW 6). However, they attempt to cure this fatal defect by now contending that the brief in their subsequent motion for extension of time to petition for rehearing properly places the issue before this Court (PW 7).

The precise question raised by petitioners' attempt has been before this Court a number of times. In all cases the result has been denial of the petition for writ of certiorari. The state of the law is succinctly summarized by STERN & GRESSMAN, SUPREME COURT PRACTICE, § 3.27, pp. 124-125 (1969):

> Raising the federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient unless the court

> actually entertains the petition and expressly decides the question. *Radio Station WOW* v. *Johnson,* 326 U.S. 120, at 128 (1945); *Hanson* v. *Denckla,* 357 U.S. 235, at 243-4 (1958); *Herndon* v. *Georgia,* 295 U.S. 441, at 443 (1935); *American Surety Company* v. *Baldwin,* 287 U. S. 156 (1932); *Forbes* v. *State Council,* 216 U.S. 396 (1910); *Simmerman* v. *Nebraska,* 116 U.S. 54 (1885) . . . There must be language indicating that the federal question was considered and disposed of. In other words, the court must exert its jurisdiction "in such a way that the case could have been brought here had the questions been raised prior to the original disposition." *Radio Station WOW* v. *Johnson, supra,* 128.

In the instant case, petitioners failed to get a petition for rehearing before the New Jersey Supreme Court since their motion for extension of time was denied (PW App. F 170a). Nor can petitioners' claim that the decision of the New Jersey Supreme Court was unexpected. Clearly they could not do so in view of the decision of the lower court (PW App. A 55a-61a) and prior decisions of the New Jersey courts in the field of education. *Jenkins* v. *Township of Morris School Dist.,* 58 N.J. 483, 279 A. 2d 619 (1971); *Riccio* v. *Hoboken,* 69 N.J.L. 649 (E. & A. 1903); *Landis* v. *School District No. 44,* 57 N.J.L. 509 (Sup. Ct. 1895).*

In addition, the petition concedes that this issue sought to be reviewed is raised only in the brief supporting petitioners' motion for an extension of time to apply for

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* The cases cited by petitioners (PW7) either arose by writ of error or concerned unique situations where the decision of the higher state court was truly a surprise and could not have been reasonably anticipated from prior decisions. (See *Herndon* v. *Georgia,* 295 U.S. 441 (1935)).

rehearing (PW 7). Here again the rule is well-settled that briefs before a state court are not part of the record filed with the Supreme Court and are not available to establish that a federal question, otherwise absent, was raised in the state court. *Lynch* v. *New York ex rel Pierson,* 293 U.S. 52 (1934); *Live Oak Water Users' Ass'n* v. *Railroad Commission of Cal.,* 269 U.S. 354 (1926); *Zadig* v. *Baldwin,* 166 U.S. 485 (1897).

Clearly, the petition should be denied since it seeks review of an issue never raised in the state court.

II. The petition is jurisdictionally defective in that it was not filed within the time period required under federal statute.

28 U.S.C. §2101(c) states:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit, or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding 60 days.

The decision and judgment of the New Jersey Supreme Court was entered on April 3, 1973.* Petitioners filed

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* The opinion of the New Jersey Supreme Court constitutes its judgment. New Jersey Court Rules 2:11-3(b). The April 3, 1973 decision of that court was clearly its opinion on the merits of the instant case. At the end of that opinion, Chief Justice Weintraub, speaking for a unanimous court, said, "Subject to the modifications expressed in this opinion and the matters reserved in the preceding paragraph, the judgment of the trial court is affirmed." (PW App. C 146a). Moreover, the June 19 supplemental opinion itself begins with the words, "In the opinion filed in this matter, 62 N. J. 473 . . .," referring to the April 3, 1973 opinion. (PW App. D 149a).

their Petition for Writ of Certiorari with this Court on September 6, 1973, 156 days after the entry of such judgment. Even had petitioners sought and obtained an extension of time from a Justice of this Court pursuant to 28 U.S.C. §2101(c), which they did not, the time for filing their petition could not have exceeded a maximum of 150 days.

Petitioners attempt, however, to evade the statutory jurisdictional disability by claiming that their time to petition this Court should run from June 19, 1973, the date the New Jersey Supreme Court filed a one-page *per curiam* supplemental opinion. Petitioners' attempt must fail. The June 19 supplemental opinion did not alter the substance of the April 3 opinion: no new substantive issues were raised, and the legal rights and duties of the parties were unaffected. Under those circumstances, the supplemental opinion does not extend the time for the filing of a petition for writ of certiorari. *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206 (1952).

III. No federal question is presented to this Court since the New Jersey Supreme Court decision rests solely on independent and adequate state grounds.

This case presents in the clearest possible way the question of whether or not the United States Supreme Court will substitute its view for that of the highest state court as to the manner in which a state constitution should be construed.

The decision of the New Jersey Supreme Court in this case was based solely on state grounds. Cognizant of this Court's opinion in *San Antonio Independent School Dist.* v. *Rodriguez*, —— U.S. ——, 93 S. Ct. 1278 (1973), the

New Jersey Supreme Court explicitly declined to rest its decision even partially on federal grounds, stating:

> There emerges from the majority opinion [in *Rodriguez*] an evident reluctance to say the federal Constitution supplies single solutions by which all states are bound. Although obviously not applauding the existing scheme, the majority would leave the problem to the processes of the several States. (PW App. C 108a)

The ground for decision in the New Jersey Supreme Court was solely that New Jersey's existing statutory system of school finance violated the express New Jersey constitutional mandate that "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools. . . ."

The adequacy of the state grounds cannot here be challenged, and it is well-settled principle that this Court will not review a state court judgment based on independent and adequate state grounds. *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1961); *Herb* v. *Pitcairn*, 324 U.S. 117 (1945); *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935); *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co.*, 243 U.S. 157 (1917); *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).

IV. No justiciable question is presented to this Court under Article IV, Sec. 4 of the United States Constitution by this case.

There is no basis for petitioners' assertion that a state constitutional determination becomes a federal question through the application of Article IV, Sec. 4 of the United States Constitution.

The purpose of the guarantee of a republican form of government was to prevent a monarchy or an aristocracy from arising in any state, not to prevent the state from substituting one republican form of government for another. In the words of James Madison, it was designed to ensure "that they shall not exchange republican for anti-republican Constitutions." (THE FEDERALIST No. 43 at 292 (J. E. Cooke ed. 1961) (J. Madison)).

Alexander Hamilton stressed that, "The guarantee could only operate against changes to be effected by violence" (THE FEDERALIST No. 21 at 131 (J. E. Cooke ed. 1961) (A. Hamilton)). This view is supported by the language of Article IV, Sec. 4 which refers to protection "against Invasion" and "against domestic Violence."*

Even if the federal government might be required to act under Article IV, Sec. 4 in connection with the peaceable establishment of a non-republican form of government, for 125 years, this Court has consistently held that such action must be taken by Congress, not by the courts. It has, therefore, ruled controversies arising under the Guaranty Clause nonjusticiable.

Beginning with *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849), this Court has held such questions political and hence beyond the power of the courts to determine. In a

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* This view of Article IV, Sec. 4 is also supported by the decision in *Hoxie School Dist. No. 46* v. *Brewer*, 137 F. Supp. 364 (E. D. Ark. 1956), *aff'd*, 238 F. 2d 91 (8th Cir. 1956), where a federal court took jurisdiction under Article IV, Sec. 4 (as well as on other federal grounds), after school officials had been threatened with violence if they did not rescind a desegregation order. The court said that the officials were entitled to invoke the guaranty clause:

> It was their sacred right to function in their offices . . ., and they logically appealed to the national courts for protection under the federal law. (137 F. Supp. at 367).

long line of cases, this Court has chosen not to limit the holding in *Luther* to the facts of that case. In *Texas* v. *White,* 74 U.S. (7 Wall.) 700 (1869), for example, the Court explained its refusal to take cases arising under the Guaranty Clause. There it upheld the power of Congress to reestablish the rights of the Confederate states in the Union; this power, it said, stemmed from the Constitutional guarantee of a republican form of government. Further,

> . . . [T]he power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress . . . . (74 U.S. at 730).

In *Pacific States Telephone & Telegraph Co.* v. *Oregon,* 223 U.S. 118 (1912), this Court reaffirmed *Luther.* There an amendment to the state constitution providing for an initiative and referendum was called into question under the republican form of government clause. This Court concluded that the issues in the case were nonjusticiable citing *Luther* as controlling.

In recent years, although repeatedly asked to take jurisdiction of questions arising under the Guaranty Clause, this Court has steadfastly refused to do so. In *Baker* v. *Carr,* 369 U.S. 186, 218 (1962), the Court said, "Guaranty Clause claims involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable." See also *Reynolds* v. *Sims,* 377 U.S. 533, 582 (1964).

Although it is not wholly inconceivable that a proper case may arise for review of this Court's longstanding policy toward questions arising under Article IV, Sec. 4, this is clearly not the proper case. For the questions posed by the petition here would require this Court to

determine whether or not separation of powers (particularly as it applies to the demarcation of the legislative and judicial branches) is an attribute of a republican form of government incumbent upon the states, and, if so, precisely what it means in a case where the highest court of a state has done no more than exercise its traditional power to determine the validity of a state statute under the state constitution.

The framers of the Constitution provided no explanation of the role of separation of powers in a republican form of government. More than anything else, "republican" form meant to them a government that derived its powers from the consent of the governed. Specifically, it was envisaged as representative government. But the framers did not go beyond this general stipulation in defining republican form. (See T. Cooley, General Principles of Constitutional Law Ch. 11 (1891).)

It has been said that the division of state governments into three separate departments is assumed in so many places in the Constitution that their continued existence is a requirement under the Guaranty Clause. (2 G. Curtis, History, Origin and Adoption of the Constitution 470 (1858)). But the cases utilizing a Guaranty Clause theory and touching on separation of powers have been held nonjusticiable. *O'Neill* v. *Leamer*, 239 U. S. 244 (1915), for example, involved alleged delegation of authority by the state legislature to the judiciary. This Court found the matter to be a "state question." Continuing, it stated, "The attempt to invoke §4 of Art. IV of the Federal Constitution is obviously futile." (239 U. S. at 248).

Ohio ex rel. Bryant v. *Akron Metropolitan Park Dist.*, 281 U. S. 74 (1930), called into question judicial action by the state's highest court. Petitioners attacked the

method mandated in the state constitution by which state statutes were found unconstitutional. This Court said, "Assuming that the Federal question is thus brought here [under Article IV, Sec. 4], we find it to be without merit." (281 U. S. at 79). Thus, there is no body of precedent providing "judicially manageable" standards by which to evaluate the question of whether separation of powers in a state government is "upset" (PW 6) by the holding of a state supreme court that a state statute is unconstitutional under a state constitutional provision. The question raised by petitioners is clearly a political one and hence nonjusticiable.

V. No federal question is raised as to separation of powers where the highest court of the state invalidates a state statute under the state constitution.

In any case, the Supreme Court of New Jersey has merely followed here the traditional practice of a highest state court in declaring a state law unconstitutional under a state constitutional provision. As that court itself noted, separation of powers is not, and cannot be, a rigid inflexible dogma:

> . . . a strict interpretation of the principle rigidly classifying all governmental action as legislative, executive, or judicial, was never intended by Montesquieu (who is generally acknowledged to have first articulated the principle as a political theory), by the founding fathers of our federal system, or by the drafters of our State Constitutions. (*David* v. *Vesta Co.*, 45 N. J. 301, 323-24, 212 A. 2d 345 (1965)) [footnotes omitted].

And similarly:

> The doctrine of separation of powers is not peculiar to New Jersey; it exists in one form or another in almost every American constitution; and it has nowhere been construed as creating watertight compartments. To do so would render government unworkable and the slave of a doctrine that has for its beneficial purpose the prevention of despotism . . . . (*Massett Building Co.* v. *Bennett,* 4 N. J. 53, 57, 71 A. 2d 327, 329 (1950)).

The right of the New Jersey Supreme Court to review the constitutionality of a State statute is not open to question. As that court has said, that right is "historically embedded in our jurisprudence." *Wilentz* v. *Hendrickson,* 135 N. J. Eq. 244, 251, 38 A. 2d 199, 204 (E. & A. 1944). Moreover, this case does not involve a question of discretion as petitioners contend, for the court is obligated to act if a statute is challenged on constitutional grounds. "[T]he judicial department has imposed upon it the solemn duty to interpret the laws in the last resort. However delicate that duty may be, . . . [it is] not at liberty to surrender, or to ignore, or to waive it." *Asbury Park Press, Inc.* v. *Woolley,* 33 N. J. 1, 12, 161 A. 2d 705, 710 (1960).

Nor is this a situation where the legislature has chosen to exercise a discretionary power less than to its fully permissible extent, as petitioners also contend. Article VIII, Sec. 4, Para. 1 of the New Jersey Constitution mandates the legislature to act in the field of education. It states: "The legislature *shall* provide for the maintenance and support of a thorough and efficient system of free public schools . . . ." (Emphasis added.)

Asbury Park Press, Inc. v. *Woolley, supra,* is a strong precedent for state court judicial review when the legislature does not fulfill an affirmative constitutional duty. There, taxpayers sought a declaratory judgment that the apportionment of the New Jersey Legislature under an act passed in 1941 was unconstitutional in light of the 1950 census. As in this case, there was a statute which covered the situation, but it failed to meet the standard demanded by the New Jersey Constitution. The court stated:

> If by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, the doors of the courts must be open to him. (33 N. J. at 14, 191 A. 2d at 711).

Since in this case, the legislature failed to meet its constitutionally imposed duty, as in *Woolley,* the state courts were obligated to open their doors to those citizens whose rights had been denied.

Moreover, the state court has shown considerable restraint in the instant case, limiting itself to the judgment that the method of state school financing is unconstitutional. The court has not mandated any solution thus far, and has acted well within its powers. Its decision does not represent a departure from tradition in New Jersey or elsewhere.

Several other state courts have also recently held methods of school financing unconstitutional under their state constitutions and challenges involving state constitutional provisions are pending in almost 30 other states. *Milliken* v. *Green,* 389 Mich. 1, 203 N.W. 2d 457 (1972);

Hollins v. *Shofstall,* No. C-253652 (Super. Ct. Ariz. June 1, 1972); *Caldwell* v. *Kansas,* No. 50616 (Dist. Ct. Kan. Aug. 30, 1972). The relief ordered by those courts is comparable to the relief ordered by the New Jersey Supreme Court in this case.

Petitioners cite in support of their contention that definition of educational standards is solely within the power of the legislature the case of *Ehret* v. *School District of Kulpmont,* 333 Pa. 518, 5 A. 2d 188 (1939). But in *Ehret,* the Pennsylvania Supreme Court noted:

> The Constitution has placed the educational system in the hands of the legislature, free from any interference from the judiciary *save as required by constitutional limitations.* (333 Pa. at 522, 5 A. 2d at 190) [Emphasis added.]*

It was the New Jersey Supreme Court's view that the "thorough and efficient" clause of the New Jersey constitution constituted a limitation on the manner in which the legislature finances education.

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* *See also Keitt* v. *Ross,* No. 2849 (C.P. 1st Dist. Pa., Feb. 16, 1973), a case arising under the Pennsylvania Constitution's "thorough and efficient" education clause, where the court said:

> Defendants urge that the heart of the matter, to wit, the raising of funds for the educational system, is a problem solely and exclusively in the discretion of the Executive and Legislative branches of Government. As a general principle, this is undoubtedly correct. The Judicial branch, in our tripartite form of government, has no right to arrogate unto itself an unlimited power of review of the exercise of legislative or executive discretions. *There is, however, an obligation to intervene where there has been a violation of a mandatory duty by the elected or administrative officials charged with carrying it out.* (Emphasis added.)

Petitioners' argument that the "thorough and efficient" mandate is not precise, and therefore not open to judicial scrutiny (PW 17), is untenable. For, "the judicial power involves the application of the law to concrete facts, and, therefore, the investigation and establishment of the facts." *Bendler* v. *Bendler,* 3 N.J. 161, 172 (1960) (quoting *Wigmore on Evidence* §7). The Superior Court, Law Division, made an exhaustive study to ascertain the facts of the instant case (PW App. A 1a-74a), which the Supreme Court carefully reviewed (PW App. C 88a-146a). Merely because the legislature has delegated "responsibility for maintaining the constitutional standards to the State Board of Education and to the Commissioner of Education," (PW 17) does not mean that the judiciary should abdicate its role as a fact-finder, especially when constitutional standards are in question.

In no way has the Supreme Court of New Jersey usurped the power of the legislature. It has left to the legislature the role of defining what a thorough and efficient system requires (PW App. D 147a); it has given the legislature more than one year to meet its constitutional obligations; and it has refrained from ordering distribution of appropriated funds should the legislature not comply with its decision *Robinson* v. *Cahill* (PW App. C 145a-146a).

That the state statute in question covered fiscal matters surely does not render it beyond the scope of state judicial power as petitioners assert (PW 17-18). The New Jersey Supreme Court has in the past required the legislature to act where appropriation of funds was at issue. In *Willis* v. *Dept. of Conservation & Economic Development,* 55 N.J. 534, 264 A. 2d 34 (1970), the court held that the state was liable in tort in a certain class of cases. They allowed the legislature eight months to set up a

statutory mechanism to make funds available to meet these tort claims. The court has gone no farther here.

In short, the Supreme Court of New Jersey has acted with restraint and within its recognized judicial powers. While fulfilling its Constitutional duty it has adhered strictly to the concept of separation of powers. Petitioners are asking this Court to substitute its judgment on a question of state law for that of New Jersey's highest court. But for this Court to do so would open the floodgates to litigation, not only in school finance cases but also in any case where a legislature dislikes a decision of the state's highest court.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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